UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES - GENERAL

Case No.	CV 15-9171 PSG JPRx	Date	July 31, 2017
Title	Anton Belevich v. Bank of America N.A., *et al.*		

Present: The Honorable	Philip S. Gutierrez, United States District Judge

Wendy Hernandez	Not Reported
Deputy Clerk	Court Reporter
Attorneys Present for Plaintiff(s):	Attorneys Present for Defendant(s):
Not Present	Not Present

Proceedings (In Chambers): Order GRANTING Preliminary Approval of Class Action Settlement

Before the Court is Plaintiff Anton Belevich's motion for preliminary approval of a class action settlement. Dkt. # 74, *Plaintiff's Unopposed Motion for Preliminary Approval of Settlement* ("Mot."). The Court held a hearing on July 31, 2017. After considering the arguments in the moving papers, as well as those presented at the hearing, the Court GRANTS the motion for preliminary approval of class action settlement.

I. Background

On September 21, 2015, Plaintiff Anton Belevich ("Plaintiff") filed this putative class action against Bank of America National Association ("Defendant" or "Bank of America") in the Los Angeles County Superior Court, alleging numerous violations of California's labor laws. Following the filing of two amended complaints in state court, on November 25, 2015, Defendants removed the case to federal court under the Class Action Fairness Act ("CAFA"). *See* Dkt. # 1.

Plaintiff pursued this class action on behalf of all non-exempt Personal Bankers (later renamed Relationship Managers) employed by Defendant in California who were allegedly denied meal periods, compliant wage statements, and waiting time penalties within the statutory time period. *See generally* Dkt. # 20, *Second Amended Complaint* ("SAC"). In the SAC, the operative complaint in this action, Plaintiff asserted claims for: (1) failure to provide meal periods in violation of California Labor Code §§ 226.7 and 512; (2) failure to provide accurate itemized wage statements in violation of California Labor Code § 226; (3) violation of California Business & Professions Code §§ 17200, *et seq.*; (4) waiting time penalties under California Labor Code §§ 201-203; and (5) penalties pursuant to the Private Attorneys' General Act ("PAGA"), California Labor Code §§ 2698, *et seq.*. *See SAC.*

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After engaging in months of formal and informal discovery, conducting a payroll, timekeeping and damages analysis, and filing motions for summary judgment and class certification, the parties mediated the case before Central District panel mediator Phyllis Cheng on April 4, 2017. *Mot.* 5. The parties did not reach a settlement at the mediation, but subsequently accepted Ms. Cheng's settlement proposal. *Id.* at 2. The parties fully executed a Memorandum of Understanding on April 11, 2017, and thereafter negotiated a comprehensive settlement agreement, titled Joint Stipulation for Class Action Settlement Agreement. *Id*. at 5–6; *see* Dkt. # 75, Ex. 1 ("Settlement Agreement").

Plaintiff contends the Settlement Agreement provides a substantial benefit to members of the class, which includes approximately 7,310 Bank of America employees who, from September 21, 2011 through December 31, 2016, worked for Bank of America in the State of California as Personal Bankers or Relationship Managers. *Mot.* 2.

Plaintiff now moves for preliminary approval of the proposed Settlement Agreement, conditional certification of the proposed settlement class, approval of the proposed notice to the class, preliminary approval of Plaintiff's Counsel as Class Counsel, approving Plaintiff as Class Representative, preliminarily approving and appointing Kurtzman Carson Consultants ("KCC") as Settlement Administrator, and the scheduling of a hearing for final approval of the settlement and entry of judgment. *See id.* at 1.

When parties settle an action prior to class certification, the Court is obligated to "peruse the proposed compromise to ratify both the property of the certification and the fairness of the settlement." *Staton v. Boeing Co.*, 327 F.3d 938, 952 (9th Cir. 2003). Preliminary approval of a class settlement is generally a two-step process. First, the Court must assess whether a class exists. *Id.* (citing *Amchem Prods., Inc. v. Windson*, 521 U.S. 591, 620 (1997)). Second, the Court must "determine" whether the proposed settlement is fundamentally fair, adequate, and reasonable." *Id.* (citing *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1026 (9th Cir. 1998)). The decision to approve or reject a settlement is within the Court's discretion. 150 F.3d at 1026.

II. Class Certification for Settlement Purposes Only

Plaintiff seeks to certify a class for settlement purposes only, defined in the Settlement Agreement as:

> "[A]ll persons, who, from September 21, 2011 through December 31, 2016 (the 'Class Period') worked for Bank of America in the State of California as a Personal Banker or Relationship Manager."

Settlement Agreement ¶ 5.

A. Legal Standard

Parties seeking certification of a settlement-only class must still satisfy the Federal Rule of Civil Procedure 23 standards. *See Hanlon*, 150 F.3d at 1019-24. Under Rule 23, a plaintiff must satisfy four prerequisites of Rule 23(a) and demonstrate that the action is maintainable under Rule 23(b)(1), (2), or (3). *See Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 613-14 (1997). The four prerequisites of Rule 23(a) are: (1) numerosity; (2) commonality; (3) typicality; and (4) adequacy of representation. Plaintiff seeks certification under Rule 23(b)(3), *see Mot.* 13, which requires that "questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy." Fed R. Civ. P. 23(b)(3).

B. Discussion

i. Numerosity

To satisfy the first prerequisite to maintain a class action under Rule 23(a), a proposed class must be "so numerous that joinder of all members would be impracticable." Fed. R. Civ. P. 23(a)(1). Courts generally presume numerosity when there are at least forty members in the proposed class. *See Charlebois v. Angels Baseball, LP*, CV 10-0853 DOC (ANx), 2011 WL 2610122, at *4 (C.D. Cal. June 30, 2011) (citations omitted); *see also Jordan v. Cnty. of L.A.*, 669 F. 2d 1311, 1319 (9th Cir. 1982), *vacated on other grounds*, 459 U.S. 810 (1982). Here, Defendant's payroll and timekeeping data identify over 7,000 potential class members. *See Mot.* 14. Since there are well over forty members in this class, numerosity is therefore easily satisfied.

ii. Commonality

To satisfy the commonality requirement of Rule 23(a)(2), Plaintiff must establish questions of law or fact common to the class as a whole. *See* Fed. R. Civ. P. 23(a)(2). The class claims must depend on a common contention that "is capable of classwide resolution—which means that determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke." *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2551 (2011). "What matters to class certification . . . is not the raising of common 'questions' – even in droves – but rather the capacity of a classwide proceeding to generate common answers apt to drive the resolution of the litigation." *Id.* (internal quotation omitted). For the purposes of Rule

23(a)(2), "even a single common question" satisfies the requirement. *See id*. at 2556 (internal quotation omitted); *Abdullah v. U.S. Sec. Assocs*., 731 F.3d 952, 957 (9th Cir. 2013) (citing *Mazza v. Am. Honda Motor Co*., 666 F.3d 581, 588 (9th Cir. 2012)).

Here, Plaintiff and the proposed class are all current and former employees of Bank of America who were subject to Defendant's uniform policies applicable to Personal Bankers/Relationship Managers. *Mot*. 14. Common questions of law and fact include whether Defendant failed to provide and pay for meal periods, and whether the class is entitled to this compensation and related penalties. *See generally SAC*. Moreover, Plaintiff and Defendant have stipulated to several facts that support Plaintiff's contention that common question of law and fact predominate, e.g. (1) Defendant's time records for the putative class members reflect meal periods that begin after the end of the fifth hour of work, and (2) prior to January 2017, Defendant did not have any mechanism in place to automatically investigate meal periods that began after the end of the fifth hour of work to determine if an additional hour of premium pay should be paid. *See generally* Dkt. # 56, *Joint Stipulation RE: Discovery Dispute*. Therefore, because there are common questions of liability that could be answered on a class-wide basis, commonality is satisfied.

iii. Typicality

Typicality requires a showing that the named plaintiffs are members of the class they represent and that their claims are "reasonably coextensive with those of absent class members," but not necessarily "substantially identical." Fed. R. Civ. P. 23(a)(3); *Hanlon*, 150 F.3d at 1020. The test of typicality "is whether other members have the same or similar injury, whether the action is based on conduct which is not unique to the named plaintiffs, and whether other class members have been injured by the same course of conduct." *Ellis v. Costco Wholesale Corp*., 657 F.3d 970, 984 (9th Cir. 2011) (quoting *Hanon v. Dataprods. Corp*., 976 F.2d 497, 508 (9th Cir. 1992)). The typicality and commonality requirements somewhat overlap. *See Gen. Tel. Co. of the Sw. v. Falcon*, 457 U.S. 147, 157 n. 13 (1982).

Here, Plaintiff's claims are typical of all other class members. Plaintiff's own time records and payroll data confirm that he took meal periods that commenced after the end of his fifth hour of work and was never compensated by any premium pay. *Mot.* 15. Similarly, Plaintiff's Counsel's review of time records produced by Defendant showed that during the class period, other Personal Bankers/Relationship Managers also recorded meal periods that began after the end of the fifth hour of work but did not receive any additional pay. *Id*.; *see also* Dkt. #74-1, *Declaration of Matthew Righetti in Support of Plaintiff's Motion for Preliminary*

Approval ("Righetti Decl.") ¶ 18. Therefore, because Plaintiff's claims are typical of those of the proposed class, the typicality requirement is satisfied.

iv. Adequacy

The final requirement of Rule 23(a) is that "the representative parties will fairly and adequately protect the interests of the class." Fed. R. Civ. P. 23(a)(4). The Ninth Circuit has indicated that "[t]he proper resolution of this issue requires that two questions be addressed: (a) do the named plaintiffs and their counsel have any conflicts of interest with other class members and (b) will the named plaintiffs and their counsel prosecute the action vigorously on behalf of the class?" *In re Mego Fin. Corp. Sec. Litig.*, 213 F.3d 454, 462 (9th Cir. 2000).

In this case, there is no apparent conflict of interest between Plaintiff and the class members. Plaintiff and the proposed class members seek monetary relief under identical facts and legal theories. *Mot.* 15. Additionally, Plaintiff is represented by counsel with extensive experience in wage and hour class action litigation. *Id.*; *Righetti Decl.* ¶ 3. Both Plaintiff and his counsel are adequate because they have effectively prosecuted the action to proposed settlement and there is no indication that they will cease these efforts throughout the settlement process. Accordingly, the adequacy requirement is satisfied.

v. Predominance and Superiority

Having concluded that Plaintiff satisfies the Rule 23(a) factors, the Court now turns to Rule 23(b)(3). Rule 23(b)(3) provides that a class may be certified where common questions of law or fact predominate over individual questions and a class action is the superior method for adjudicating the controversy as a whole. *See* Fed. R. Civ. P. 23(b)(3). The predominance aspect specifically "tests whether proposed classes are sufficiently cohesive to warrant adjudication by representation." *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 623 (1997). "When common questions present a significant aspect of the case and they can be resolved for all members of the class in a single adjudication, there is clear justification for handling the dispute on a representative rather than on an individual basis." *Hanlon*, 150 F.3d at 1022.

Here, Plaintiff contends that Defendant engaged in a uniform course of failing to provide meal periods before the end of the fifth hour of work and consequently failed to provide one hour of meal period premium pay. *See generally SAC.* Thus, the question of whether Defendant's uniform and systematic employment policies failed to provide compensation as required by law is common to the entire class, and predominates over any individual issues which might exist. *Mot.* 16.

Additionally, the Court finds that a class action is the superior method for adjudicating controversies like this. Requiring hundreds of class members to litigate their labor claims separately would be inefficient and costly, resulting in duplicative and potentially conflicting proceedings. *See Lerwill v. Inflight Motion Pictures, Inc.*, 582 F.2d 507, 512 (9th Cir. 1978) ("Numerous individual actions would be expensive and time-consuming and would create the danger of conflicting decisions as to persons similarly situated."). Class members could face difficulty finding legal representation and could lose incentive to bring their claims if forced to do so in isolation. *See In re Napster, Inc. Copyright Litig.*, No. C 04-1671 MHP, 2005 WL 1287611, at *8 (N.D. Cal. June 1, 2005) (finding superiority in part because "many small composers individually lack the time, resources, and legal sophistication to enforce their copyrights"). Accordingly, the Court finds that the class action is the superior method for adjudicating the controversy, and the requirements of Rule 23(b)(3) are therefore satisfied.

C. Conclusion

Plaintiff has met the requirements for class certification under Rule 23. Therefore, the Court CERTIFIES the proposed class for settlement purposes only; APPOINTS Plaintiff's counsel as Class Counsel; and APPOINTS Plaintiff as Class Representative.

III. Preliminary Approval of the Proposed Class Action Settlement

The next step is to determine whether the settlement reached is "fair, reasonable, and adequate." Fed. R. Civ. P. 23(e)(2).

A. Legal Standard

The approval of a class action settlement is a two-step process under Rule 23(e). *In re Am. Apparel, Inc. S'holder Litig.*, No. CV 10-6352 MMM (CGx), 2014 WL 10212865, at *5 (C.D. Cal. July 28, 2014). "First, the court must determine whether the proposed settlement deserves preliminary approval." *McKenzie v. Federal Exp. Corp.*, 2012 WL 2930201, at *2 (C.D. Cal. July 2, 2012) (citing *Nat'l Rural Telecomms. Coop. v. DIRECTV, Inc.*, 221 F.R.D. 523, 525 (C.D. Cal. 2004)). Second, once notice of the settlement is given to the class members, the court must hold a fairness hearing and determine whether final approval is warranted. *Id.*

"At the preliminary approval stage, a court determines whether a proposed settlement is within the range of possible approval and whether or not notice should be sent to class members." *True v. Am. Honda Motor Co.*, 749 F. Supp. 2d 1052, 1063 (C.D. Cal. 2010). Preliminary approval amounts to a finding that the terms of the proposed settlement warrant

consideration by members of the class and a full examination at a final approval hearing. *Manual for Complex Litigation* (Fourth) § 13.14 at 173. Preliminary approval is appropriate if "the proposed settlement appears to be the product of serious, informed, non-collusive negotiations, has no obvious deficiencies, does not improperly grant preferential treatment to class representatives or segments of the class, and falls within the range of possible approval." *Ma v. Covidien Holding, Inc.*, No. SACV 12-2161 DOC, 2014 WL 360196, at *4 (C.D. Cal. Jan. 31, 2014); *Eddings v. Health Net, Inc.*, No. CV 10-1744 JST (RZx), 2013 WL 169895, at *2 (C.D. Cal. Jan. 16, 2013).

After notice is given to the class, preliminary approval is followed by a review of the fairness of the settlement at a final fairness hearing, and, if appropriate, a finding that it is "fair, reasonable and adequate." Fed R. Civ. P. 23(e)(2); *see also Lane v. Facebook, Inc.*, 696 F.3d 811, 818 (9th Cir. 2012); *Hanlon*, 150 F.3d at 1027. In making this determination, the district court must "balance a number of factors: the strength of the plaintiffs' case; the risk, expense, complexity, and likely duration of further litigation; the risk of maintaining class action status throughout the trial; the amount offered in settlement; the extent of discovery completed and the stage of the proceedings; the experience and views of counsel; the presence of a governmental participant; and the reaction of the class members to the proposed settlement." *Hanlon*, 150 F.3d at 1026; *see also Staton v. Boeing Co.*, 327 F.3d 938, 959 (9th Cir. 2003); *Officers for Justice v. Civil Serv. Comm'n of San Francisco*, 688 F.2d 615, 625 (9th Cir. 1982) (noting that the list of factors is "by no means an exhaustive list").

The district court must approve or reject the settlement as a whole. *See Hanlon*, 150 F.3d at 1026 ("It is the settlement taken as a whole, rather than the individual component parts, that must be examined for overall fairness."). The Court may not delete, modify, or rewrite particular provisions of the settlement. *See Dennis v. Kellogg Co.*, 697 F.3d 858, 868 (9th Cir. 2012); *Hanlon*, 150 F.3d at 1026. The district court is cognizant that the settlement "is the offspring of compromise; the question . . . is not whether the final product could be prettier, smarter or snazzier, but whether it is fair, adequate and free from collusion." *Hanlon*, 150 F.3d at 1027. Because it is provisional, courts grant preliminary approval of a class action settlement where the proposed settlement does not disclose grounds to doubt its fairness and lacks "obvious deficiencies." *In re Vitamins Antitrust Litig.*, No. MISC 99-0197(TFH), 2001 WL 856292, at *4 (D.D.C. July 25, 2001) (quoting *Manual for Complex Litigation* (Third) § 30.41).

B. Overview of the Settlement Agreement

The Settlement Agreement provides for a gross settlement fund of $6,000,000 ("GSF") to be paid in consideration for the settlement and the release of any related claims as described in

the settlement agreement. *See Settlement Agreement* ¶¶ 19, 23; s*ee also Mot.* 9. The GSF will fund: (1) attorneys' fees in an amount not to exceed 25 percent of the GSF, or $1,500,000; (2) litigation costs incurred by Class Counsel in the amount of $18,500; (3) a class representative incentive award to Plaintiff in an amount up to $10,000; (4) settlement administration costs in the amount of $39,000 payable to KCC; and (5) the payment of $25,000 for civil penalties under PAGA. *Settlement Agreement* ¶ 23, 32–33, 42. The remaining funds ("Net Settlement Fund" or "NSF"), estimated at $4,410,724, will be distributed to class members who submit a valid and timely claim form. *Mot.* 18; *Settlement Agreement* ¶ 24.

Each participating class member will be entitled to receive a portion of the Net Settlement Fund based upon the number of weeks worked during the Class Period. *Settlement Agreement* ¶ 38. First, the Net Settlement Fund will be divided by the total number of weeks worked by members of the class during the Class Period. *Id*. The resulting amount will be the amount of dollars each class member will be entitled to per qualifying workweek. *Id.* Then, the number of qualified work weeks worked by each individual member multiplied by the dollar amount per week shall comprise the member's individual settlement payment. *Id.* Class members will receive their payments in the form of a check. *Id*. ¶ 63. For the purposes of taxes, a class member's individual settlement share shall be allocated as 1/3 wages, 1/3 penalties, and 1/3 interest. *Id.* ¶ 44.

Any unclaimed amount from the Net Settlement Fund will be used to pay the Defendant's share of payroll taxes due based upon any payments to class members pursuant to this settlement. *Id.* ¶ 41, 58. The payroll taxes will first be paid from the amount attributable to identified putative class members who do not submit a valid Claim Form. *Id*. ¶ 58. If this amount is insufficient, Defendant will be responsible for separately paying the balance. *Id*. ¶ 41. If, on the other hand, .there are funds remaining after Defendant's payroll taxes have been paid, those will be redistributed to class members who submitted a timely and valid claim form on a pro rata basis, or, if the amount remaining is too small to redistribute, the funds will proceed to a court approved charity pursuant to the *cy pres* doctrine. *Id.*

Of the total $25,000 allocated for PAGA penalties, 75 percent will be paid to the California Labor and Workforce Development Agency ("LWDA") and the remaining 25 percent will remain in the NSF for distribution to the class members. *Id.* ¶ 42; *Mot.* 10.

The Settlement Agreement also contemplates a release by all participating class members of "any and all individual and class claims . . . that were alleged in the Lawsuit, including, but not limited to any claims under federal or state law that are alleged in the Second Amended

Complaint."[1] *Id.* ¶ 64. Any class member who does not request exclusion will be bound by the release. *See id.*; *Mot.* 11.

C. Analysis of Settlement Agreement

i. Fair and Honest Negotiations

In general, evidence that a settlement agreement is arrived at through genuine arms' length bargaining with a private mediator supports a conclusion that the settlement is fair. *See Rodriguez v. West Publishing Corp.*, 563 F. 3d 948, 965 (9th Cir. 2009) ("We put a good deal of stock in the product of an arms-length, non-collusive, negotiated resolution."); *see also Sarabi v. Weltman, Weinberg & Reis Co., L.P.A.*, 10-CV-1777 AJB NLS, 2012 WL 3809123, at *1 (S.D. Cal. Sept. 4, 2012) (holding that a settlement should be granted preliminary approval after the parties engaged in extensive negotiations); *see also Aarons v. BMW of North America, LLC*, No. CV 11-7667 PSG (CWx), 2014 WL 4090564 at *10 (C.D. Cal. 2014) (declining to apply a presumption but considering the arm's length nature of the negotiations as evidence of reasonableness). Additionally, the amount of discovery completed prior to reaching a settlement is important because it bears on whether the parties and the court have sufficient information before them to assess the merits of the claims. *See e.g., Lewis v. Starbucks Corp.*, No. 2:07-CV-0490 MCE DAD, 2008 WL 419690, at *6 (E.D. Cal. Sept. 11, 2008). Accordingly, "[a] settlement following sufficient discovery and genuine arms-length negotiation is presumed fair." *Bravo v. Gale Triagle, Inc.*, No. CV 16-3347 BRO (GJSx), 2017 WL 708766, at *11 (C.D. Cal. Feb. 16, 2017) (citing *Nat'l Rural Telecomms. Coop.*, 221 F.R.D. at 527).

Here, the evidence supports the conclusion that the settlement is fair. The Settlement Agreement was reached after more than a year and a half of litigation. During this time, the parties engaged in extensive formal and informal written discovery where each party propounded and responded to requests for production of documents and special interrogatories. *Mot.* 4; *Righetti Decl.* ¶ 13. Additionally, the parties participated in an informal exchange of documents and information concerning Defendant's policies and procedures regarding meal

[1] At the hearing, Plaintiff's Counsel indicated that the release pertains only to claims related to Defendant's alleged failure to properly provide meal periods and/or pay meal period premiums, and does not include claims that could be brought under the Fair Labor Standards Act. *See Tijero v. Aaron Bros., Inc.*, CV 10-1089 SBA, 2013 WL 60464, at *7–8 (N.D. Cal. Jan. 2, 2013) ("[T]he Court finds that it is contrary to § 216(b) to bind class members to a release of FLSA claims where, as here, the members have not affirmatively elected to participate in the lawsuit by filing a written consent form.").

periods and timekeeping, and collected data regarding the potential class. *Mot.* 4. Plaintiff and Defendant's depositions were taken, and at the time of the settlement, a third deposition was on calendar. *Id.* at 5. After Defendant filed its motion for summary judgment and Plaintiff filed his motion for class certification, the parties agreed to mediate the dispute before Phyllis Cheng, the Central District panel mediator assigned to the case. *Id*. at 5, 21. After a day of mediation and subsequent negotiations, the parties approved a settlement proposal presented by the mediator on April 11, 2017. *Id.* at 5, 21. There is no indication that there were any dishonest or collusive dealings between the parties in reaching this settlement. Moreover, the extensive formal and informal discovery conducted in this case suggests that the parties were well informed and had sufficient information to assess the merits of their claims. *See Lewis*, 2008 WL 419690, at *6; *Glass v. UBS Fin. Servs., Inc* ., CV 06-4068 MMC, 2007 WL 221862, at *5 (N.D. Cal. Jan. 26, 2007), *aff'd* 331 F. App'x 452 (9th Cir. 2009) (reasoning that the parties' having undertaken informal discovery prior to settling supports approving the class action settlement) (citing *In re Mego* , 213 F.3d at 459). The Court is therefore satisfied that the Settlement Agreement is the product of fair and honest negotiation.

ii. Settlement Amount

To evaluate whether a Settlement Amount falls within the range of possible approval, "courts consider plaintiffs' expected recovery balanced against the value of the settlement offer." *In re Tableware Antitrust Litig.*, 484 F.Supp.2d at 1080.

Here, the Settlement Agreement provides for a gross settlement amount of $6,000,000 to be paid in consideration of the settlement, dismissal of the action, and the release of claims. *See generally Settlement Agreement.* Plaintiff's counsel reviewed time records for Personal Bankers/Relationship Managers during the Class Period to calculate Defendant's potential liability as to all claims. *Mot*. 6–9; *Righetti Decl.* ¶ 16. Based on these records, Plaintiff estimated Defendant's exposure for the meal period claim to amount to $5,476.792.47 based on a multiplication of the average hourly rate of $19.97 by approximately 274,251 missed meal periods recorded by potential class members. *Mot.* 8. As to waiting time penalties, the data showed that of the estimated 7,310 putative class members, approximately 1,700 are former employees with potential waiting time penalties. *Id*. Defendant's maximum potential exposure as to this claim therefore amounts to $8,147,760, based on 1,700 former employees multiplied by the average hourly rate of $19.97, multiplied in turn by 8 hours and 30 days. *Id.* Lastly, PAGA provides for a civil penalty between $100 for the initial violation and $200 for each subsequent violation per aggrieved employee per pay period. Cal. Lab. Code § 2699(f)(2). Therefore, based on the estimated 70,000 pay periods worked by putative class members, the maximum penalty under PAGA amounts to $13,999.900. *Mot.* 8–9. The GSF of $6,000,000

therefore represents approximately 22 percent of the maximum possible damages and penalties attainable in this case, which is well within the range of approval. *See In re Mego Fin. Corp. Sec. Litig.*, 213 F.3d 454, 456, 458 (9th Cir. 2000) (comparing a nearly $2 million gross settlement payment to a potential recovery figure of $12 million and finding that recovering "roughly one-sixth of the potential recovery" was fair and adequate under the circumstances of the case); *Glass v. UBS Fin. Servs.*, CV 06-4068 MMC, 2007 WL 221862, at *4 (N.D. Cal. Jan. 26, 2007) (approving a settlement for unpaid overtime wages where the settlement amount constituted approximately 25% of the amount plaintiffs might have proved at trial); *see also Rigo v. Kason Indus., Inc.*, CV 11-64MMA (DHB), 2013 WL 3761400, at *5 (S.D. Cal. July 16, 2013) ("[D]istrict courts have found that settlements for substantially less than the plaintiff's claimed damages were fair and reasonable, especially when taking into account the uncertainties involved with the litigation.").

Moreover, the Settlement Agreement confers a substantial benefit on class members who would otherwise face a significant risk of obtaining no recovery at all if forced to proceed with litigation. Defendant denies any wrongdoing and maintains that it always provided Plaintiff and its Personal Bankers with the opportunity to take a meal break before the end of the fifth hour of work. *See Mot.* 7 n.1. Plaintiff concedes that whether Defendant actively prevented class members from taking timely meal periods is the quintessential dispute in this case and carries significant implications for establishing liability and prevailing on class certification. *Id.* at 6, 18–19. Therefore, in light of the uncertainties involved in this case, as well as the delay and expense associated with continued litigation, the Court finds that the settlement amount is within the range of approval.

The Court notes only one concern. The Settlement Agreement provides that any funds left after paying class members' awards will be used to pay Defendant's share of payroll taxes due on account of the settlement payments. *Settlement Agreement* ¶¶ 41, 58. Because such a provision could constitute a reversion to Defendant, before granting final approval, the Court will require additional information regarding the amount paid to cover Defendant's share of payroll taxes.

iii. Cy Pres

The Settlement Agreement provides that, in the event there are funds remaining after Defendant's payroll taxes have been paid, and if redistribution to class members is not feasible, the remaining funds will proceed to a court approved charity pursuant to the *cy pres* doctrine. *Settlement Agreement* ¶ 41. The Ninth Circuit requires all *cy pres* distributions to (1) address the objectives of the underlying statutes; (2) target the plaintiff class; and (3) provide reasonable

certainty that any member will be benefitted. *Naschin v. AOL, LLC*, 663 F.3d 1034, 1036 (9th Cir. 2011) (emphasizing that whether a *cy pres* remedy is fair, adequate and reasonable depends upon whether the award "account[s] for the nature of the plaintiffs' lawsuit, the objectives of the underlying statues, and the interests of the silent class members."). Here, Plaintiff has not provided the Court with sufficient information about the charity organization that will receive the *cy pres* distribution. Accordingly, before final approval, the parties are ordered to submit a memorandum outlining the work that the contemplated organization does, how it is related to the present action, and how the distribution will benefit class members.

iv. Attorneys' Fees

When approving attorneys' fees in common fund cases, courts in the Ninth Circuit have discretion to apply the percentage-of-the-fund method or the lodestar method to determine reasonable attorneys' fees. *See Powers v. Eichen*, 229 F.3d 1249, 1256 (9th Cir. 2000). If employing the percentage-of-the-fund method, the "starting point" or "benchmark" award is 25 percent of the total settlement value. *See Vizcanio v. Microsoft Corp.*, 290 F.3d 1043, 1048-1050 (9th Cir. 2002); *Torrisi v. Tucson Elec. Power Co.*, 8 F.3d 1370, 1376 (9th Cir. 1993). Here, the Settlement Agreement provides that Class Counsel may request the Court to award attorneys' fees in an amount up to 25 percent of the GSF ($1,500,000). *Settlement Agreement* ¶ 32. Because 25 percent is the "benchmark" established in the Ninth Circuit, the suggested attorneys' fees award is preliminarily approved. However, the Court will perform a cross-check of the reasonableness of Class Counsel's anticipated attorneys' fee request using the lodestar method; therefore, Class Counsel is required to provide the Court with additional memoranda showing the requested hourly rate and hours expended in this case.

v. Incentive Award

"Incentive awards are fairly typical in class action cases." *Rodriguez v. W. Publ'g Corp.*, 563 F. 3d 948, 958 (9th Cir. 2009) (citations omitted). The Settlement Agreement provides that Plaintiff will request an incentive award in an amount not to exceed $10,000. *Settlement Agreement* ¶ 33. Courts typically examine the propriety of an incentive award by comparing it to the total amount other class members will receive and considering the efforts the plaintiff made in furtherance of the litigation. *See Staton v. Boeing Co.*, 327 F.3d 938, 975 (9th Cir. 2003). Courts have approved incentive awards of $7,500 when individual claimants receive an average award of at least $4,000 in a wage and hour class action settlement, *see Morales v. Stevco, Inc.*, No. 1:09-cv-00704 AWI, 2012 WL 1790371, at *14, 16-19 (E.D. Cal. May 16, 2012); *Alvarado v. Nederend*, No. 1:08-cv-01099 OWW DLB, 2011 WL 1883188, at *9-11 (E.D. Cal. May 17, 2011), and courts have reduced incentive payments to $2,500 where wage

and hour class members would each receive, on average, only $65.79, *see Monterrubio v. Best Buy Stores*, L.P., 291 F.R.D. 443, 463 (E.D. Cal. May 14, 2013). Here, Plaintiff does not provide an estimated average recovery for each class participant, so the Court is unable at this time to evaluate the suitability of the requested incentive award. The Court notes that incentive awards that are significantly disproportionate to the amount unnamed plaintiffs will receive "raise serious concerns as to [an agreement's] fairness adequacy, and reasonableness." *See Staton*, 327 F.3d at 975 ("Indeed, '[i]f class representatives routinely expect to receive special awards in addition to their share of the recovery, they may be tempted to accept suboptimal settlements at the expense of the class members whose interests they are appointed to guard.").

Moreover, although the Court notes that Plaintiff initiated this action, is the only representative in this case, and has participated in the discovery and mediation process, the parties have not provided the Court with sufficient information regarding the efforts Plaintiff made in pursuit of the litigation, including the hours spent assisting this litigation, nor has Plaintiff submitted a declaration detailing his efforts. *See, e.g.*, *Wade v. Minatta Transp. Co.*, No. C10-2796 BZ, 2012 LEXIS 12057, at *3 (N.D. Cal. Feb. 1, 2012) (finding the class representatives, who reported "they were involved with the case by interacting with counsel, participating in conferences, reviewing documents, and attending the day-long mediation that resulted in the settlement" failed to justify an incentive award of $10,000). *See Van Vranken v. Atlantic Richfield Co.*, 901 F. Supp. 294, 300 (N.D. Cal. 1995) (decreasing the plaintiff's incentive award where plaintiff did not list the number of hour spent toward litigation, but "participated in 49 telephone conferences and five meetings with Class Counsel, attended three pre-trial hearings, had his deposition taken twice, and testified at trial").

Despite the deficiencies, an award compensating Plaintiff appears to be appropriate in this case, provided that the amount requested reflects Plaintiff's efforts and is proportionate to other class members' awards. Accordingly, before the final approval, Class Counsel will be ordered to submit a memorandum and declaration justifying Plaintiff's incentive award, including a detailed description of his efforts in pursuit of the case.

vi. PAGA Penalty

The parties have agreed to a PAGA award of $25,000. *Settlement Agreement* ¶ 42. In accordance with California Labor Code section 2699(i), the Settlement Agreement provides that the LWDA will receive 75 percent of the $25,000 and the remaining 25 percent will be distributed to the class. *Id.*; *see also* Cal. Lab. Code § 2699(i) (providing that 75 percent of civil penalties recovered by aggrieved employees should be distributed to the LWDA). Therefore, the LWDA will receive $18,750 and the remaining $6,250 will be allocated to the members of the

class. *Id.* This allocation represents 0.41 percent of the $6,000,000 GSF which falls within the zero to two percent range for PAGA claims approved by courts. *See, e.g.*, *In re M.L. Stern Overtime Litig.*, No. CV 07-0118 BTM (JMAx), 2009 WL 995864, at *1 (S.D. Cal. Apr. 13, 2009) (approving PAGA settlement of 2 percent, or $20,000); *Hopson v. Hanesbrands, Inc.*, No. CV 08-0844 EDL, 2008 WL 3385452, at *1 (S.D. Cal. Apr. 13, 2009) (approving a PAGA settlement of 0.3 percent, or $1,500); *Nordstrom Comm'n Cases*, 186 Cal. App. 4th 576, 589 (2010) (approving settlement of wage and hour class action claims and PAGA claims under which no money was allocated to the PAGA claims). Therefore, the Court finds that the settlement of the claims for penalties under PAGA is reasonable.

D. Notice

Before the final approval hearing, the Court requires adequate notice of the settlement be given to all class members. Federal Rule of Civil Procedure 23(c)(2)(A) provides that the Court may direct "appropriate" notice to a class certified under Rule 23(b)(1). "Notice is satisfactory if it 'generally describes the terms of the settlement in sufficient detail to alert those with adverse viewpoints to investigate and to come forward and be heard.'" *Churchill Vill., LLC v. Gen. Elec.*, 361 F.3d 566, 575 (9th Cir. 2004) (quoting *Mendoza v. Tucson Sch. Dist. No. 1*, 623 F.2d 1338, 1352 (9th Cir. 1980)).

Plaintiff has provided the Notice of Proposed Class Action Settlement which sets forth in clear language (1) the nature of the action and the essential terms of the settlement agreement; (2) the meaning and nature of the class; (3) Class Counsel's application for attorney fees, the proposed incentive payment for Plaintiff, and the estimated administration costs; (4) the calculation and distribution of the Net Settlement Fund; (5) how to request exclusion; (6) how to dispute the total number of workweeks worked during the claim period; (7) how to object to the settlement; (8) how to submit a claim; (9) information concerning the release; (10) the Court's procedure for final approval of the settlement; and (11) how to obtain additional information regarding this case and the Settlement Agreement. *See* Dkt. # 74-1, Ex.A ("Notice").

Within twenty days of the entry of an order granting preliminary approval of the Settlement Agreement and Notice, Defendant will provide the Settlement Administrator with the last known address, telephone number, and social security number for each putative class member, in addition to the number of weeks each class member worked as a Personal Banker or Relationship Manager in California during the class period. *Settlement Agreement* ¶ 46. The Settlement Administrator will use skip-tracing methods to update the contact information on the database and mail the Notice and Claim Form via first class mail to the last known address of each putative class member. *Id.* ¶ 47. For any Notice materials that are returned as

undeliverable, the Settlement Administrator will use skip tracing to obtain a valid mailing address and promptly re-mail the Notice and Claim Form to the new address. *Id.* ¶ 48. Class members will have forty-five days from the date that the Notice is first mailed to submit their Claim Forms, objections, and requests for exclusion, as well as dispute the information shown on their Claim Form regarding their workweeks. *See Settlement Agreement* ¶¶ 50–54. The Notice explains the opt-out and objection procedures. *See Notice* 6–8.

The Court finds that the Notice complies with the requirements of Fed. R. Civ. P. 23(c). However, the Court notes a minor problem; as it currently stands, the front page of the notice misstates the Court belonging to the Eastern District of California.

IV. Conclusion

For the foregoing reasons, the Court GRANTS Plaintiff's motion for preliminary approval of class settlement. The Court CERTIFIES the proposed Class; APPOINTS Plaintiff as Class Representative; and APPOINTS Plaintiff's counsel as Class Counsel for the Settlement Class. The Court PRELIMINARILY APPROVES the Settlement Agreement and APPROVES the Notice (provided that the Notice is amended as requested above). The final approval hearing is set for **December 4, 2017.**

The Court ORDERS, at least 30 days before the final approval hearing and in addition to the motion for final approval for class action settlement:

- A memorandum justifying Plaintiff's counsel's award of attorneys' fees and costs that includes declarations supporting the reasonableness of each attorney's requested hourly rate, itemized billing statements showing hours worked, hourly rates, expenses incurred thus far, and expenses to be incurred in the future;

- A memorandum justifying the incentive award for Plaintiff, including a detailed description of Plaintiff's efforts in pursuit of this case, and supporting declarations;

- A memorandum explaining the amount of the settlement fund used to pay for Defendant's share of payroll taxes;

- A memorandum justifying the proposed *cy pres* distribution;

- A copy of the amended Notice reflecting the changes requested above.

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES - GENERAL

Case No.	CV 15-9171 PSG JPRx	Date	July 31, 2017
Title	Anton Belevich v. Bank of America N.A., *et al.*		

IT IS SO ORDERED.